Petition

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81-2118

No.

IN THE

Supreme Court of the United States

October Term, 1981

JUAN FERNANDEZ-URIARTE,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented.

1. Whether it was error for the lower court to have adjudged petitioner guilty of knowing and intentional agreement to participate in the broad conspiracy charged.

2. Whether the trial court erred in its ruling on the question of venue and in its failure to charge the jury on the issue of single vs. multiple conspiracies.

Table of Contents.

	Page
Questions Presented	i
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	16
Appendix A—Judgment of the Court of Appeals	1a
Appendix B—Order Denying Petition for Rehearing with Suggestion for Reconsideration *en banc*	1b

TABLE OF AUTHORITIES.

CASES:

Berger v. United States, 295 U.S. 78 (1935)	13
Kotteakos v. United States, 328 U.S. 750, 774 (1946)	8, 12, 13
Krulewitch v. United States, 336 U.S. 440 (1949)	15

Page

United States v. Borelli, 336 F2d 376 (2nd Cir. 1964), cert. denied 379 U.S. 960 (1965) 9

United States v. Calabro, 467 F2d 973, 983 (2nd Cir. 1972) 12

United States v. Cambindo Valencia, 609 F2d 603, 623 (2nd Cir. 1979), cert. denied *sub nom.* Bermudez Prado v. United States, 446 U.S. 940 (1980) 8, 10

United States v. DeNoia, 451 F2d 979, 981 (2nd Cir. 1971) 8

United States v. Johnson, 323 U.S. 272, 275-278 (1944) 15

United States v. Magnano, 543 F2d 431, 434 (2nd Cir. 1976) 10

United States v. Moten, 564 F2d 620, 626 (2nd Cir. 1977) 13

United States v. Peoni, 100 F2d 401, 403 (2nd Cir. 1938) 8

United States v. Rosenblatt, 554 F2d 36, 39 (2nd Cir. 1977) 14

United States v. Sperling, 506 F2d 1323, 1342 (2nd Cir. 1974) 8, 11

Page

United States v. Torres, 503 F2d 1120 (2nd Cir. 1974) 10

United States v. Tramunti, 513 F2d 1087, 1107 (2nd Cir. 1975) 11

STATUTES CITED:

21 U.S.C. §841(a) (1) 2
21 U.S.C. §846 2
18 U.S.C. §3237 ..... 2, 13

FEDERAL RULES OF CRIMINAL PROCEDURE CITED:

Rule 18 13
Rule 21(b) 13

UNITED STATES CONSTITUTION CITED:

Article III, §2 ..... 8, 14
Fifth Amendment 7
Sixth Amendment 14
Fourteenth Amendment 8

No. __.

IN THE

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v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinion Below.

The Court of Appeals for the Second Circuit affirmed the judgment of conviction without formal opinion. The Court's unpublished memorandum appears at Appendix A, page 1a, *infra*. A petition for rehearing with suggestion for reconsideration *en banc* was denied without opinion (Appendix B, p. 1b, *infra*).

Jurisdiction.

The judgment of the Court of Appeals was filed on January 6, 1982. The petition for rehearing was denied on March 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved.

21 U.S.C. §841(a) (1) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. §3237 provides in pertinent part:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

Statement of the Case.

Petitioner and eight others were named in a one-count indictment charging infringement of 21 U.S.C. §841(a) (1) and 21 U.S.C. §846 in connection with a conspiracy to distribute a quantity of cocaine hydrochloride, a Schedule

II narcotic drug controlled substance (App. 1a-3a).* The eight were tried jointly in the Eastern District of New York before Hon. Jack Weinstein.** After trial by jury, all but one—Rogelio Cobos—were found guilty. Judgment was entered on July 1, 1981, at which time petitioner was sentenced to six years imprisonment. On January 6, 1982, the Court of Appeals affirmed the judgment of conviction with a brief, unpublished opinion. On March 15, 1982, a petition for rehearing with suggestion for reconsideration *en banc* was denied by the Court of Appeals, without opinion.

At trial, the evidence tended to show that petitioner, a 42 year-old resident of Florida, delivered a cardboard box to Arthur Freeman, Sr., the proprietor of "Art's Garage" in the City of Miami on February 23, 1981 (Tr. 196, 241). For purposes of this petition, it is conceded that the box contained one kilogram of cocaine hydrochloride, *arguendo*.

Petitioner was at that time a passenger in a Ford Bronco driven by long-time friend and acquitted co-defendant, Rogelio Cobos. In the elapsed span of one minute, the vehicle pulled up to the garage and petitioner handed the box to Freeman, who was waiting outside. Cobos and petitioner then drove away (Tr. 917, 1013).

With the exception of Cobos and Freeman, petitioner neither met, observed nor conferred with any of the other

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*"App." refers thoughout to the appendix filed with petitioner's brief on appeal below. "Tr." refers to the trial transcript, as cited in the proceedings below.

**Two additional defendants—charged in a second count with violating 18 U.S.C. §2—entered pleas of guilty on the conspiracy count before petitioner's trial commenced.

parties charged or with any of the FBI agents involved in this case in their various undercover capacities.*

It appeared from the evidence that Freeman had been arranging a deal in the preceding days, set to culminate in the back room of his garage on the 23rd (Tr. 913, 1041, 959-962). Before Cobos and petitioner arrived, Freeman had displayed two kilograms of 90 percent pure cocaine hydrochloride to two prospective buyers (FBI Special Agents) and to one Harry Hugo Hickson, their escort (Tr. 187). Hickson was a friend and business associate of co-defendant Earl Widener, a major drug entrepreneur in the south Florida area (Tr. 115, 209, 830).

The intended buyers refused to consummate the deal when Freeman failed to produce an additional kilogram, allegedly promised at an earlier juncture (Tr. 188). To that end, Freeman apparently dispatched the additional "kilo," announcing that he was placing a telephone call to "the Cubans" (Tr. 189, 190). Below, it was not disputed that Cobos and petitioner are of Cuban extraction; petitioner having come to this country in 1960.

Earlier that day—the morning of the 23rd—Hickson stopped by the garage to consult Freeman, to hide an attache case, and to reserve the back room for later use (Tr. 166, 903, 940, 1025). The evidence further showed that Hickson had stopped by the garage on prior occasions and was in constant long-distance telephone contact with Freeman (Tr. 939, 959, 1035, 1038).

Throughout the period leading up to this final day, Hickson advised the other confederates that their contemplated exchange would take place in a legitimate auto

*Petitioner routinely serviced the family car and his airboat at Art's Garage. At trial, the defense maintained that the cardboard box he delivered contained certain mechanical parts which Freeman required for repairs to the airboat.

garage; that the people ultimately in control consisted of a father and son team (Tr. 166, 178). It was never disputed that "Art's Garage" was operated by Art Freeman, Sr., and his son, "Junior," one of the other co-defendants at trial.

Linked to the genesis of this case was a team of professional criminals from New Jersey, Florida and Texas, with whom Hickson collaborated. Their intended buyers (FBI undercover) were understood to come from New York, representing one of the Brooklyn crime families (Tr. 44, 49, 180). The transaction at bar began not with the sale or attempted sale of drugs, but of $2.5 million dollars worth of stolen American Express Travellers Checks in the possession of two corporate executives attached to an IBM office in New Jersey (Tr. 5). In negotiations with undercover agents out of the FBI's New York office, the subject of cocaine was raised on February 3, 1981, when former co-defendant Gannon advised that he knew several people in Florida with unlimited supplies of the substance in almost pure form. Posing as members of the Brooklyn underworld, the FBI agents flew to Florida for a meeting with Gannon's friend, Earl Widener, a major drug operative (Tr. 45-47). The meeting took place at a condominium owned by retired IBM executive George Brenn, a former business associate from New Jersey. There, the agents awaited a highly-touted sample which Widener had promised (Tr. 47, 48, 157). While they waited (ultimately in vain, it turned out), Widener spoke of his partners from Texas (Hickson, Andrews) and bragged about business ventures in the smuggling and importation of narcotics from Jamaica and Colombia (Tr. 115, 818, 819, 830). While the sample never arrived (Widener said his pilot was exhausted from a long flight) some details of the impending drug deal were fleshed out. On the day of the proposed sale, one of the agents would be held hostage, while the others would turn over

their money and be provided the cocaine at a separate, as yet undisclosed location, somewhere in the south Florida vicinity (Tr. 84). After spending the night without having received a sample, the agents returned to New York, Widener promising that he would eventually make good on his word.

On February 16, 1982, from a telephone located in the Eastern District of New York, undercover agents contacted Widener in Florida and arranged for delivery of the proposed sample—allegedly in excess of 90 percent pure. There was no mention of "Cubans" or of petitioner by Widener or by anyone else. Two days later, at Bernie's Diner in Brooklyn, New York, former defendants Gannon and Schubella (a/k/a "Banning") handed the agents a paper bag containing a quantity of cocaine later determined to be in the 60 to 70 percentile range of purity. Widener's source for the cocaine was never disclosed; there was conjecture that the sample originated not from Florida, but from the New York area itself (Tr. 803, 805). Those present at the Bernie's meeting suggested a final meeting in Florida on the 21st—at which time the presumed deal would be consummated, a total of ten kilograms to be involved (Tr. 159, 401, 407).

Three undercover agents flew to Florida on the 20th and Widener made various introductions on the 21st. Conspicuously absent was any reference to "Cubans" or to the petitioner. Gannon was introduced as "the guy who brought the people (the agents) from New York down to the deal;" a long-time associate of Widener's close friend, George Brenn. Hickson and Andrews were depicted as Widener's friends from Texas who "came up * * * to put the deal together." Rubinett was another friend, who would "help with the transaction" (Tr. 160, 402-404, 409, 421). The garage, some 20 minutes away, was revealed by Hickson as "the place they were going to get the cocaine"

(Tr. 406, 408).* At first, Rubinett was to escort the agents to Freeman. Later, Hickson assumed the task, contacting "the people at the garage" to request that they wait for his arrival. Due to the lateness of the hour and the ensuing confusion, however, the proposed "buy" was rescheduled for the following Monday, the 23rd of February (Tr. 416, 420, 422).

It was not until the final minutes of that day that the "Cubans" were called upon to transport the third and final kilogram. On appeal, petitioner maintained that this single act of delivery was not sufficient to draw him into the ambit of the sophisticated "Widener" conspiracy—that he and Cobos were Cuban couriers; members of a second, discrete conspiracy with one of the Widener links—Art Freeman, Sr. This material variance (proof of two conspiracies where only one had been charged) was substantial, petitioner urged, because the single delivery adduced at trial could not by itself support an inference of subjective foreknowledge of the broader conspiracy or the requisite mental state to join in its goals.

At argument, the Second Circuit Court of Appeals suggested that any person of Cuban extraction arriving on the scene with a parcel similar in its contents would justifiably be said to have agreed with Widener, *et al.*, to become a co-venturer in the particular scheme charged. The panel thusly concluded that "each of the appellants was aware of the scope of this conspiracy * * *."

Reasons for Granting the Writ:

1. The Court of Appeals' affirmance in the instant case represents an abridgment of petitioner's constitutional right to a fair trial under the Fifth Amendment and to due

*At trial, the government maintained that Hickson was "the person who has direct contact with the people who control the drugs" (Tr. 17).

process of law under the Fourteenth. The affirmance not only conflicts with Second Circuit authority regarding the subjective elements of conspiratorial agreement, but is in conflict with rulings promulgated by this Court concerning prejudicial variance, evidentiary spillover and the misjoinder of conspiracy co-defendants. As an additional matter, petitioner's rights under Article III, Section 2, of the Constitution and as derived under the Sixth Amendment are here implicated on the question of appropriate trial venue.

Petitioner has never disputed his status as a passenger in a vehicle known to have entered the area outside Art Freeman's garage apparently in the final moments of a conspiracy already in progress. The crux of petitioner's claim, simply, is that he may not lawfully be charged with complicity in that particular criminal endeavor from the proofs elicited at trial. The material variance at trial and related legal errors flowing therefrom have worked to the substantial detriment of petitioner's right to a fair trial, it is submitted, and demand appellate redress by the granting of the instant petition. This conclusion obtains because the inference of knowledge, agreement and therefore membership as to him cannot flow in any logical fashion from an evaluation of the larger enterprise, petitioner's limited conduct, and the criminal dependency of each conspirator, one to another. This has been the basic teaching of Second Circuit case law from the time of *United States v. Peoni,* 100 F2d 401, 403 (2nd Cir. 1938), to the present. *United States v. Cambindo Valencia,* 609 F2d 603, 623 (2nd Cir 1979), *cert. denied sub nom. Bermudez Prado v. United States,* 446 U.S. 940 (1980). See also, *United States v. DeNoia,* 451 F2d 979, 981 (2nd Cir. 1971); *United States v. Sperling,* 506 F2d 1323, 1342 (2nd Cir. 1974). This view is similarly buttressed by this Court's discussions in *Berger v. United States,* 295 U.S. 78 (1935), and *Kotteakos v. United States,* 328 U.S. 750, 774 (1946).

Viewed in a light most favorable to the government, the full extent of petitioner's single act that day and throughout consisted of a one-minute delivery in broad daylight, in which a cardboard box was handed to Art Freeman, Sr., the proprietor of an auto repair shop.* From his demonstrable foreknowledge and prior contact with Hickson, Freeman was clearly an active confederate, instrumental in culminating the larger conspiracy that day in the back room of his garage. Freeman and eight others had a major stake in the success of Widener's venture; a venture geared ultimately to larger scale dealings with ostensible underworld figures from the Brooklyn area, represented by the FBI special agents on hand. Petitioner simply did not share in these ultimate goals. He neither had any palpable interest in the fate of Widener's drug distribution ring nor was his limited participation essential to its success. Any number of couriers—Cuban or otherwise—could have transported the parcel in question, and that would not have made them full-blown members of the single conspiracy charged, even with the loosest of interpretations.

In *United States v. Borelli,* 336 F2d 376 (2nd Cir. 1964), *cert. denied,* 379 U.S. 960 (1965), the essential importance of determining each defendant's individual understanding of the nature of the agreement was reiterated:

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*For purposes of this petition, it is conceded that the box contained approximately one kilogram of cocaine hydrochloride. Notwithstanding the presence of contraband, it is petitioner's contention that agreement with and membership in the Widener conspiracy does not obtain. At best, petitioner may be said to have conspired with Art Freeman only in a separate and more limited endeavor; that the proof elicited at trial amply supported the existence of a second, more discrete, three-man conspiracy consisting of Freeman, petitioner, and the owner-driver of petitioner's vehicle, acquitted codefendant Rogelio Cobos.

> "Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, *the gist of the offense remains the agreement,* and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."

Since the conspiracy statute charged herein specifically contemplates an element of knowledge or intentional culpability, the Court must inquire of petitioner's *subjective* awareness by evaluating qualitative connections linking him to the others. It is submitted that petitioner's single, isolated act does not alone support an inference of acquiescence in the larger conspiratorial scheme. Something more is needed. *United States v. Magnano,* 543 F2d 431, 434 (2nd Cir. 1976).

Accordingly, petitioner's fortuitous status as a member of one of the largest ethnic groups in the south Florida area cannot suffice as "independent evidence." Were this so, then any number of "Cubans" arriving on the scene with a package would be deemed to have assisted not only Freeman—a legitimate inference—but to have joined in the broader venture orchestrated by Widener. Upon oral argument, however, the Court of Appeals suggested as much. With respect, petitioner urges that such a view stretches the Court's previous rulings beyond reason. *United States v. Torres,* 503 F2d 1120 (2nd Cir. 1974).

With respect, petitioner asserts that the ultimate variance at trial did not require that the jury be limited merely to the single conspiracy charged. "When the facts are such that a jury might reasonably find *either* a single conspiracy or multiple conspiracies, then the trial judge must not limit their deliberations to a single conspiracy finding." *United States v. Cambindo, supra.* Below, we would submit, the jury was charged in a deficient manner,

straying beyond the decided cases. After denying various defense motions requesting severance and acquittal (Tr. 728, 762), the trial judge, stated, "Seems to me like a very simple charge; One count of conspiracy charged * * *." The jury was then merely instructed that "[a] defendant must be found not guilty in this case if you think him guilty of another crime, not the one charged" (Tr. 1325). This charge, we submit, was clearly unwarranted and confusing from the perspective of a layman. No juror, from that language, would have understood that "another crime" may well have embraced a second (albeit discrete) conspiracy with one link common to the first. Instead, petitioner would suggest, the trial judge should have:

> "* * * properly marshalled the evidence; explained in detail the essential elements of the crime of conspiracy; focused the jury's attention on the importance of their determining whether each defendant joined the conspiracy and the scope of his agreement; and specifically charged that if the government 'has failed to prove the existence of only one conspiracy, you must find the defendants not guilty'." *United States v. Sperling, supra,* at 1341.

At the very least, as in *United States v. Tramunti,* 513 F2d 1087, 1107 (2nd Cir. 1975), the court should have described explicitly the possibility of several conspiracies, instructing the jury that in order to convict a given defendant, it must "find that he was a member of the conspiracy charged in the indictment *and not some other conspiracy.*" (Emphasis added.)*

*The Court's actual jury instruction is curious, in light of an earlier promise made to petitioner's trial counsel: "Well, I will give the jury the usual multiple count conspiracy charge. If they find a series of discreet [*sic*] conspiracies[,] they can't convict (P. 36, April 16, 1981 proceedings).

Concededly, "a trial court is not required to charge on the issue of multiple conspiracies in every case where such a request is made." But such an instruction, we submit, must be given unless—under the circumstances—there is absolutely no evidence upon which a jury could infer the existence of two conspiracies. *United States v. Calabro,* 467 F2d 973, 983 (2nd Cir. 1972).

Clearly, petitioner's was not such a case.

The delivery of appropriate jury instructions may well have cured the obvious spillover of prejudicial evidence having nothing to do with petitioner. In a 1400-page trial transcript, petitioner's testimony consumed approximately 38. Numerous transactions and meetings having nothing to do with "Cubans" in general or the petitioner in particular are reflected throughout, as are extraneous drug deals on the part of other defendants, lending weight to an inappropriate conclusion—that petitioner, like his presumed confederates, was a drug dealer too.

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to a substantial right has not taken place." *Kotteakos v. United States, supra,* at 774.

It is also noteworthy that the Court of Appeals found it necessary to characterize petitioner as "the ultimate supplier of the three kilograms of cocaine." Such a view is more in concert with the U. S. Attorney's summation than it is with the record. With respect, the Court's position was speculative and simply finds no support in the record below. The panel's conclusion that "each of the appellants was aware of the scope of this conspiracy" and that the evidence against each was "overwhelming" takes similar

liberties with the evidence and strays beyond the appropriate inquiry of an appellate tribunal. It cannot be gainsaid that affirmance may not alone rest on the mere fact that the weight of the evidence as against a particular defendant was overwhelming or compelling. The appellate court's function is not to determine guilt or innocence, "nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance." *Kotteakos* at 763, 765.

It is the settled law of this Court that questions of variance are subject to a modified rule of harmless error. *Berger v. United States,* 295 U.S. 78. The ultimate test in this case is whether severance or curative jury instructions would have altered the verdict. As to him, petitioner submits that another verdict would have obtained. That this was a close case is manifested by the jury's acquittal of petitioner's travelling companion and friend, Rogelio Cobos. Major drug conspiracies having become almost commonplace in urban centers, it would appear paramount that the unfairness inherent in mass trials be avoided at all cost, recognizing a jury's inability to delineate the limitations of evidence to certain defendants. *United States v. Moten,* 564 F2d 620, 626 (2nd Cir. 1977).

2. Directly linked to the trial court's erroneous assertion of a single, overarching "international" conspiracy, was its ruling on the question of venue and its subsequent refusal to transfer this action to the District of Florida pursuant to Rule 21(b), Federal Rules of Criminal Procedure.

There is, of course, no question but that criminal trials may be had "in a district in which the offense was committed." Rule 18, Federal Rules of Criminal Procedure. With

reference to conspiracy law, venue is appropriate in any district in which any act in furtherance of the common scheme was "begun, completed or committed" by any of the conspirators (Tr. 1370). 18 U.S.C. §3237.

Petitioner has no quarrel with the trial court's assertion of the "overall purpose" of the Widener conspiracy:

> "to supply in Brooklyn 50,000 grams of almost pure cocaine * * *. So, in terms of cereal boxes, where they speak about servings, we are dealing with more than a million servings of cocaine designated ultimately for consumers in the Eastern District of New York" (Tr. 1369-1377).

What remains highly disputed is the Court's observation that "everyone understood that the cocaine would ultimately be delivered for use in Brooklyn, in this district, or Queens * * *." *Id.*

Petitioner strenuously maintains that he was never given to understand that Brooklyn or any point north of Florida would be the ultimate terminus for the substance in question, or that mafia-types would be involved. The record discloses that petitioner had nothing to do with the crucial Bernie's meeting of February 18th in Brooklyn and that he can not, in fact, be deemed a member of the broader conspiracy.

When questions arise concerning the appropriate situs of trial, it becomes "crucial * * * to determine the scope of the conspiratorial agreement." *United States v. Rosenblatt,* 554 F2d 36, 39 (2nd Cir. 1977). Petitioner has maintained that any agreement on his part in the instant case discloses a Florida-based subconspiracy with Art Freeman only; there being no hint of New York or Texas connections from his perspective on the proof adduced at trial.

Appearing twice in the Constitution—Article III, Section 2 and in the Sixth Amendment—the question of venue in criminal cases invokes the important federal right of the accused to be tried in his own vicinage. In the case at bar, that would limit the government to trial in the District of Florida only.

This Honorable Court is cognizant of an unfortunate reality—that constitutional protection in the venue area often finds itself reduced "to a phantom, for the crime [conspiracy] is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its objective." *Krulewitch v. United States,* 336 U.S. 440 (1949). That phantom of protection is further eroded in the case at bar, we have urged, simply because there is no basis to link petitioner to the single conspiracy presumed by the trial court for venue purposes (Tr. 730-731, 1369-1377).

At the very least, discretionary transfer to the District of Florida under Rule 21(b) was warranted for the convenience of petitioner, of counsel, of prospective character witnesses and to avoid the "needless hardship" of prosecution remote from home and from appropriate facilities for the defense. To preserve the appearance of a fair trial at least, the lower court should have exercised its discretion to avoid the "appearance of abuses if not * * * abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *United States v. Johnson,* 323 U.S. 272, 275-278 (1944).

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A.

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January one thousand nine hundred and eighty-two.

Present:

Honorable Leonard P. Moore,
Honorable Irving R. Kaufman,
Honorable Ellsworth Van Graafeiland,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

EARL WIDENER, ARTHUR FREEMAN, Sr., ARTHUR FREEMAN, Jr., JUAN FERNANDEZ-URIARTE, MINOR ANDREWS, BENJAMIN RUBINETT, HARRY HUGO HICKSON,

Appellants.

81-1291 thru 1297

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. Appellants assert that Judge Weinstein erred in denying their motions for severance. The denial of a motion for severance is clearly within the discretion of the trial judge. *United States v. Turcotte,* 515 F.2d 145 (2d Cir.), *cert. denied sub nom. Gerry v. United States,* 423 U.S. 1032 (1975). We will rarely disturb his decision on review absent a showing of substantial prejudice. See *United States v. Stirling,* 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978). In addition, it is not enough for the appellants to show that they might have had a better chance of acquittal had they been tried alone. *United States v. Borrelli,* 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied,* 401 U.S. 946 (1971).

2. Where there is proof of the existence of a single conspiracy and of the appellants' involvement in that conspiracy, the trial court's refusal to sever is proper. *See United States v. Sperling,* 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied sub nom. Goldstein v. United States,* 420 U.S. 962 (1975). The record in the instant case amply demonstrates that each of the appellants was aware of the scope of this conspiracy and each played a role which was vital to the success of the venture. Fernandez-Uriarte was the ultimate supplier of the three kilograms of cocaine; the Freemans facilitated delivery to the buyers; Widener, with the aid of Andrews and Hickson, orchestrated the entire

transaction. Rubinett was to safeguard the profits from this venture. Furthermore, in light of the overwhelming evidence against each appellant, none has made the showing of substantial prejudice necessary to mandate severance. *See United States v. Ochs,* 595 F.2d 1247, 1260 (2d Cir.), *cert. denied,* 444 U.S. 955 (1979). Accordingly, Judge Weinstein properly denied their motions.

3. Appellants contend that venue in the Eastern District of New York was improper. Venue lies in the district where any overt act is committed in furtherance of the conspiracy by any co-conspirator. *See United States v. Panebianco,* 543 F.2d 447, 445 (2d Cir. 1976), *cert. denied sub nom. Anatala v. United States,* 429 U.S. 1103 (1977). The Government has the burden of proving venue by a preponderance of the evidence. *United States v. Leong,* 536 F.2d 993, 996 (2d Cir.), *cert. denied sub nom. Olsen v. United States,* 429 U.S. 924 (1976).

4. In the instant case, the Government's proof established that residents of Texas, Florida and New Jersey combined to sell cocaine to buyers they knew to be from New York. The negotiations leading up to the February 23, 1981 sale began on February 3 when Douglas Gannon called FBI agent Nelson in Queens to offer him cocaine and marijuana. The next day Nelson advised Gannon that his associates were interested in purchasing ten kilograms of cocaine. Pursuant to these conversations, agents Nelson and Hanna travelled to Florida to meet appellant Widener, Gannon's connection and to sample the drugs. Widener was unable to produce a sample at that time and consequently arranged for a sample to be delivered to agent Nelson in New York. That sample was given to agent Nelson at a meeting at Bernie's Diner in Brooklyn. Clearly, this was an act in furtherance of the conspiracy to sell cocaine to buyers from New York. Accordingly, venue in the Eastern District was proper.

5. Appellants claim that if venue were proper in the Eastern District, Judge Weinstein should have granted their motions for transfer for the convenience of the parties. The decision to transfer rests in the discretion of the trial judge. *See United States v. Keuylian,* 602 F.2d 1033 (2d Cir. 1979).

6. When Judge Weinstein considered the motion to transfer the case to Florida, three defendants were residents of New Jersey, two were from Texas, and six were from Florida. Thus, there was no way to avoid inconveniencing some of the defendants at trial. Furthermore, although the arrests took place in Florida, the agent in charge of the case and the Government's key witnesses were from New York. The appellants did not call any witnesses on their behalf nor did they represent to the court that they intended to do so. In addition, although the drug sale took place in Florida, it was understood that the cocaine was to be distributed in the New York area. In light of these factors, Judge Weinstein did not abuse his discretion in refusing to transfer the case.

7. Appellants' other claims are equally without merit.

LEONARD P. MOORE
IRVING R. KAUFMAN
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

APPENDIX B.

Order Denying Petition for Rehearing With Suggestion for Reconsideration *en Banc.*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fifteenth day of March, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARL WIDENER, HARRY HICKSON, ARTHUR FREEMAN, BENJAMIN RUBINETT, JUAN FERNANDEZ URIARTE, MINOR ANDREWS, ARTHUR FREEMAN, Jr., ROGELIO COBOS,

Defendants,

EARL WIDENER, HARRY HUGO HICKSON, ARTHUR FREEMAN, Sr., BENJAMIN RUBINETT, JUAN FERNANDEZ-URIARTE, MINOR ANDREWS and ARTHUR FREEMAN, Jr.,

Defendants-Appellants.

Nos. 81-1291 thru 81-1297

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Juan Fernandez-Uriarte,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is Denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk
by FRANCIS X. GINDHART
Chief Deputy Clerk